92-1577

Supreme Court, U.S.
FILED
MAR 17 1993
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

RICHARD L. BRITT AND TIMOTHY JACKSON, JR. ET AL,

Petitioners,

v.

THE GROCERS SUPPLY COMPANY,

Rrespondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a plaintiff claiming age discrimination in employment pursuant to 29 U.S.C. §621, *et seq* can survive a motion for summary judgment by the defendant-employer on the issue of "pretext" by introducing affidavits which attest to (1) comments by the employers' upper level management personnel which have age-biased pejorative implications, **coupled with** (2) actual employment practices used by the employer to create the illusion of a full work force thereby avoiding recall of older employees, including the Plaintiffs.

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Mae Alice Britt (substituted as a party for Richard L. Britt, deceased), Timothy Jackson, Jr., and 126 additional individuals who opted-in this case pursuant to 29 U.S.C. §216(b) by filing their written consents[1] were the Plaintiffs-Appellants in Case Number 91-2493 in the United States Court of Appeals for the Fifth Circuit. The Grocers Supply Company, Inc. was the Defendant-Appellee in the court of appeals.

Additionally, in the court below, this case was consolidated with Case Number 91-6043, styled *James E. Hamilton, et al vs. The Grocers Supply Company, Inc.* The Plaintiffs-Appellants in that case are filing a separate Writ of Certiorari[2] and will appropriately identify all of the parties in that suit.

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[1] Because the list of consenting Plaintiffs-Appellants is lengthy, a listing of their names is provided on pages iii and iv.

[2] The *Hamilton* plaintiffs timely filed a petition for rehearing which raised a procedural issue not available to the *Britt* plaintiffs because two cases were tried separately and judgements were entered at different stages in the trial court process. For that reason and because the appellate court's opinion on rehearing made no reference to the *Britt* case, to avoid any jurisdictional questions the *Britt* petition for writ of certiorari is being filed within 90 days of the original decision in the court below.

Ben, Aaron
Ben, Willis
Bertrant, Glendon Felix
Boyd, Carl
Burke Sr., Lenzie
Burley, Sylvester
Campbell, Leslie
Campbell, Major
Chatman, Willie
Clark, Sam
Clayton, L.C.
Clinton, Samuel
Coleman, Richard
Coney, Alvin
Coruthers, Elijah
Craft, Bruce
Craft, Glen H.
Darby, James E.
Davis, Bill
Davis, Jessie C.
Dease, Charles
Deason, Willie
Doggett, Jesse
Douglas, Joe
Drewy, William
Ealey, Walter
Edwards, Donald
Espree, Edward
Finkelstein, Melvyn
Frank, Nelson
Garner, James A.
Garza, Arturo N.
George, Marshall
Gladney, Herbert
Gooden, Elbert L.
Grant, Ernest
Green, Allen
Green, Costell
Greene, Dalfred
Greene, Judge
Greene, Lonnie
Greene, Tom
Greene, Wilfred
Greer, James
Gross, Vernon
Guillory, Larry J.
Gums Jr., Edward
Hailey, Elbert E.
Hall, Turner
Hamilton, Alfred
Hamilton, Alfred
Hargrove, Robert
Harris, Leonard
Harris Jr., Willie
Henry, Joseph
Hernandez, Edward
Hightower, James
Hill, James
Hinton, Carl Edward
Hogan, Gilbert
Holloway Sr., Clarence
Hooks, Raymond
Eugene Hunter
Hunter, Sr., W.L.
Ivory, Clarence
Jackson, Earnest L.
Jackson, Emmerson
Jackson, James
Jackson, Leland
Jackson, Levearl

Jackson, Lorenzo
Jackson, Richard
Jacobs, Talton
Johnson, Wheeler
Jones, Craig
Jones, Floyd
Jones, Marvin
Jones, Roy
King, Cardis L.
Ladet, Hillary
Landry, Curtis
Lane Jr., A.G.
Latin, Robert
Lee, George
Mack, Jerry
Martin, Felix
McAfee Jr., Aubrey
Meekins Sr., Dan
Menifee, Clay
Minor, Jerome D.
Mosley, Robert
Neal, Harold E.
Patterson, Alvin
Patterson, George
Payton, Freelon
Pittman, Bobby
Readus, Willie
Richardson, Curtis
Rideout, Edward
Roach, Jerry
Robins, R.L.
Rogers, Rollie
Royer, Milton
Rusher, Harvey
Rusher, Harvey
Sanders, Robert
Scott, James
Scott, Murray
Scott, Wilson
Searcy, Archie
Seastrunk, Gary Don
Simmons, James
Smith, Leroy
Spencer, Manfred
Thomas, James
Tolivar, Lloyd
Veazie, Kirby
Washington, Howard
Webster, Robert
Wheatfall, K.T.
Whittington, Alfred
Williams, Earnest
Williams Eldrid
Williams, Thomas
Wright, William Barlow
Young, Clarence
Young, Russell

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No. _____

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Supreme Court of the United States

OCTOBER TERM, 1992

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RICHARD L. BRITT AND TIMOTHY JACKSON, JR. *ET AL*,

Petitioners,

v.

THE GROCERS SUPPLY COMPANY,

Respondent.

_____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

_____

PETITION FOR WRIT OF CERTIORARI

_____

Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on December 15, 1992. (Petition for rehearing in consolidated case denied March 1, 1993).

OPINIONS BELOW

The decision of the district court for the Southern District of Texas is reported at 760 F. Supp. 606 (S.D. Tex. 1991) The decision of the Fifth Circuit Court of Appeals is reported at 978 F.2d 1441 (5th Cir. 1992). The opinion of the court below on the petition for rehearing filed by the *Hamilton* plaintiffs is included here as Appendix A.

BASIS FOR JURISDICTION

The final judgment of the court of appeals was entered on December 15, 1992. Rehearing was denied in the consolidated case on March 1, 1993. This court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

Age Discrimination and Employment Act, 29 U.S.C. §623(a):

"It shall be unlawful for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in a way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or (3) to reduce the wage rate of any employee in order to comply with this act."

Federal Rules of Civil Procedure, Summary Judgment, Rule 56(c) and (e):

(c) Motions and proceedings thereon.

"... the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law... ".

(e) Form of affidavits; further testimony; defense required.

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein ... when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial... ."

STATEMENT OF THE CASE

As this case came before the district court for summary judgment consideration, it consisted of a claim asserted by Britt and Jackson, individually and on behalf of others similarly situated, with one hundred twenty-six (126) additional Plaintiffs opting-in pursuant to Section 216(b) of the Fair Labor Standards Act, 29 U.S.C. §201, *et seq.*, alleging a claim of age discrimination against Grocers Supply

Company. The Plaintiffs were employees of Grocers Supply Company and members of the Teamsters Local Union No. 968. There had been an approximate thirty year bargaining relationship between Grocers Supply Company and Teamsters Local Union No. 968. The most recent collective bargaining agreement between the company and the teamsters was effective April 7, 1985, was due to have expired October 4, 1986, but was extended by oral agreement until December 21, 1986, at which time the bargaining unit employees, including the Plaintiffs, struck the company. The strike was precipitated by a breakdown in collective bargaining negotiations, and principally, a dispute over the company's proposal to change the basis of employee compensation from an hourly wage to a pay rate based on a productivity standard. The work force consisted principally of employees over the age of forty (40) years old, with the exception of part time or casual employees, and bitterly opposed any production quota system. The company was equally adamant in insisting that it must have a pay rate based on productivity. The strike lasted until April 3, 1987, when the striking employees, including the Plaintiffs, voted to unconditionally offer to return to work. On April 6, 1987, picketing activities ceased. The Plaintiffs immediately attempted to return to work but were refused employment and advised that they had been permanently replaced. The Plaintiffs, however, were to be considered eligible for reinstatement to their former jobs and were to be recalled as soon as positions became available. Incredibly, none of the Plaintiffs' positions became "available" during the following years.

When the strike commenced, Grocers Supply immediately filled all vacancies with new job applicants. Originally, all applicants were informed they were temporary employees pending strike developments. Although the exact time frame was never clear, the company began converting

the replacement employees from temporary to "regular" or "permanent" status sometime early in 1987 before the strike ended. The company maintained this process was completed prior to the time the striking force, including the Plaintiffs, offered to return to work, that thereafter no job vacancies became available, and, therefore, none of the Plaintiffs were allowed to return to work.

After it became apparent that they would not be allowed to return to work, Britt and Jackson exhausted all administrative remedies available within the statutory periods, received "right to sue" letters and, eventually, filed this lawsuit both in their individual capacity and on behalf of others similarly situated. Plaintiffs alleged their "permanent replacement" was a sham or subterfuge and that they were never recalled to their former jobs because of age motivated factors.

The company's original Motion for Summary Judgment was based on two arguments, one purely legal and the other purely factual. The legal argument simply asserted that since the alleged discriminatory conduct occurred in the context of a labor dispute, economic strike and its aftermath, the ADEA claims were preempted by the NLRA. The factual argument originally put forth by Grocers Supply was that a *prima facia* case could not be established because the Plaintiffs were "permanently replaced" after they voluntarily went on strike, and, therefore, were never "discharged."

With regard to the legal issue of preemption, Plaintiffs pointed out to the district court that no authority existed sustaining the proposition that the NLRA preempted the ADEA and that the same conduct could arguably constitute a violation of the NLRA while at the same time support a cause of action asserted under the ADEA.

The Plaintiffs opposed the factual basis of the Defendant's Motion for Summary Judgment by showing (1) that the Defendant failed to discharge its initial burden as a summary judgment movant to demonstrate the absence of a genuine issue of material fact; (2) that conduct other than "discharge" was encompassed by and could constitute a violation of the ADEA; (3) that a *prima facie* case was established by showing (a) the Plaintiffs were in the protected class; (b) they were qualified to perform the duties of their job; and (c) younger persons were more favorably treated by being hired for, promoted to, or replacing Plaintiffs from a job for which Plaintiffs were qualified and available to assume. Further, the Plaintiffs offered evidence, in the form of three affidavits more fully discussed in the following section, controverting the company's articulated non-discriminatory reasons for never recalling Plaintiffs and thereby raised an issue regarding pretext as to such stated reasons.

The district court granted summary judgment in favor of Grocers Supply Company on April 8, 1991. In its opinion, the district court found the Plaintiffs' *prima facie* case lacking in three elements. First, the Plaintiffs were not "discharged"; second, the Plaintiffs presented no evidence of the class members' ages or that all of them were over forty; and third, the Plaintiffs offered no evidence that they were replaced by younger employees. The court assumed the Plaintiffs to be qualified. Further, the district court then held that even assuming a *prima facie* age case could be established, the Plaintiffs' ADEA claim would be preempted by the NLRA.

The Plaintiffs timely perfected their appeal to the Fifth Circuit Court of Appeals. This case was consolidated in the appellate court with case no. 91-6043, *James E. Hamilton, et. al, vs The Grocers Supply Company, Inc.*

which had been tried separately at the trial court level. The Fifth Circuit Court of Appeals held that the ADEA claim was not preempted by the NLRA but, nevertheless, affirmed the summary judgment in the *Britt* case and directed verdict in the *Hamilton* case on the grounds that the Plaintiffs had failed to prove that the reasons offered by the Defendant for failing to recall the Plaintiffs to their former positions were pretextual. The appellate court apparently assumed the existence of a *prima facie* case.

The *Hamilton* plaintiffs timely filed a petition for rehearing arguing that the issue of pretext had never been reached in their case because the trial court granted a directed verdict at the close of their case-in-chief. The *Britt* plaintiffs did not file a similar petition for rehearing because pretext was clearly an issue in the summary judgment proceedings. The Fifth Circuit agreed procedurally with the *Hamilton* plaintiffs but denied rehearing and affirmed the trial court on other grounds. In its opinion on petition for rehearing, the court below did not address the *Britt* facts or change its reasoning for affirming summary judgment in the *Britt* case.

REASON FOR GRANTING CERTIORARI

CERTIORI SHOULD BE GRANTED TO RESOLVE CONFLICTS IN THE OPINIONS OF THE LOWER COURTS REGARDING THE SUFFICIENCY OF EVIDENCE NECESSARY TO CREATE A JURY ISSUE ON THE QUESTION OF PRETEXT IN AN AGE DISCRIMINATION CASE WHERE AGE RELATED COMMENTS ARE RELIED UPON, IN PART, BY THE ADEA PLAINTIFF.

As the Fifth Circuit noted in its opinion below, it is relatively easy for an ADEA plaintiff to establish a *prima facia* case and the Defendant-employer to articulate a non-discriminatory reason for the decision or action in question. See also *Amburgey vs. Corhart Refactories Corp., Inc.*, 936 F.2d 805, 811 (5th Cir. 1991). Therefore, most cases of this nature are resolved, as indeed this case was, at that stage of inquiry which considers whether the Defendants articulated reasons are "pretextual". That inquiry necessarily leads into consideration of the Defendant-employer's motivation and most frequently an ADEA plaintiff will rely upon age related comments as either direct or indirect evidence of the employer's true motivation in reaching the decision in question. This case presents an opportunity for the Supreme Court to consider the important question of to what extent an ADEA plaintiff might rely upon, and what weight should be given to, age related statements occurring in the workplace when attempting to determine the true motivation of the employer.

In this case, the focus was on the company's permanent replacement of the Plaintiffs and its failure to ever recall the Plaintiffs to their former jobs. The Plaintiffs contended that their permanent replacement was a sham or subterfuge and that the company would not allow them to return to work because of their age. The reasons articulated by the company for permanently replacing the Plaintiffs was that the temporary employees were leaving the company to take permanent jobs elsewhere and the company was grateful to the temporary employees for keeping it in business during the strike. Further, the company stated that the Plaintiffs were never recalled to their former positions simply for the reason that no positions became open or available.

A plaintiff may show that the employers' articulated reasons are pretextual by proving either (1) that a discriminatory reason more likely motivated the employer, or (2) that the employers' reason is unworthy of credence. *Texas Dep't. of Community Affairs vs. Burdine, 450 U.S. 248, 253-56, 101 S. Ct. 1089, 1093-95 (1981).* A variant of that test states that the plaintiff can establish pretext by proving that the reasons stated by the employer, "though facially adequate, was untrue as a matter of fact or was, although true, a mere cover or pretext". *Normand vs. Research Institute of America, Inc., 927 F.2d 857, 859 (5th Cir. 1991).* In the summary judgment context, however, the question is not whether the plaintiff proves pretext, but, rather, whether the plaintiff presents evidence which raises a genuine issue of fact regarding pretext. *Burdine,* supra 450 U.S. 256, 101 S. Ct. at 1095. In other words, to defeat a summary judgment motion on the issue of whether defendant's proffered non-discriminatory reason was pretextual, a plaintiff need only point to evidence which could support a reasonable inference that the employer's explanation is unworthy of credence. The plaintiff is not required to produce evidence which "necessarily leads" to the conclusion that the employer acted for discriminatory reasons. *Sorba vs. Pennsylvania Drilling Co.*, 821 F.2d 200, 205 (3rd Cir. 1987), Cert. denied, 484 U.S. 1019, 108 S. Ct. 730, 98 L. Ed. 2d 679 (1988).

A. SUMMARY JUDGMENT EVIDENCE ON PRETEXT

In the summary judgment proceedings, which were subject to review by the Fifth Circuit, the Plaintiffs offered three (3) affidavits to establish the existence of a genuine issue of material fact both as to motivation and credibility on the part of the company regarding its explanation for permanently replacing and refusing to recall Plaintiffs to their former positions. These three affidavits contained testimony

by employees, other than Plaintiffs, of the company attesting to age related comments by the company's upper level management which could have a possible age bias implication, *coupled with* actual personnel practices on the part of the company observed by each witness which would belie the truth of the company's articulated non-discriminatory reasons.

The first affidavit was that of Rose Joubert, who was employed by the company from 1981 through December 28, 1987, as an industrial nurse in the company's "medical services" department. In the normal course of her employment, she was in charge of the employees' medical files, responsible for physical examinations required by the D.O.T., and reviewed and processed insurance claims for both job related and non-job related injuries and insurance claims. Additionally, during the strike, she personally worked with the personnel department in taking and processing job applications to fill the vacancies created by the striking employees, including Plaintiffs.

In her affidavit, Ms. Joubert testified both to (a) statements made by persons involved with the company's upper level management that had age biased implications, and (b) personnel practices implemented by the company which directly contradicted the reasons articulated by the company for not recalling Plaintiffs and which could support an inference of discriminatory conduct on the part of Defendant. The age related comments which Ms. Joubert testified to were attributed to Mr. Bob Silverman, a special management consultant, who on several occasions requested the affiant to provide him with medical information from her files that would help him get rid of older employees. Mr. Silverman also stated on numerous occasions that the company's biggest problem was that the employees were "too old and making to much money." She further testified that

the promotion of the temporary replacements to "permanent employees" was done to eliminate an excessive temporary work force which was hired immediately after the strike commenced rather than to staunch the flow of temporary employees leaving to find permanent work as the company contended. She also testified to the fact that the company would hire employees to subsidiaries and use them to fill jobs which otherwise would have been available to the Plaintiffs and that the so-called "permanent replacements" were more accurately characterized as permanent part time workers because they were never allowed to obtain full benefits normally attendant to permanent employment with the company. Finally, based upon the personnel practices which she actually observed and was instructed to carry out, Ms. Jorbert offered her lay opinion that the company was discriminating against its older employees.

The second affidavit offered by Plaintiffs addressing the issue of pretext was that of Ms. Pamela Reetz. This affiant was employed as a secretary and administrative assistant in the transportation department of the company and worked with management and supervisors within that department. She testified as to age biased statements attributed both to Mr. Robert Silverman and Mr. Robert Hunt, manager of the transportation department. Mr. Silverman was heard to state in several meetings that the drivers were "too old, making too much money, that benefits were excessive, and that the workers were lazy." Mr. Robert Hunt stated in several meetings of the supervisors that the drivers "were too old and lazy, and making too much money." Mr. Hunt also stated that the strike would allow the company to bring in a "fresh batch" of employees at a "cheaper price." Ms. Reetz also testified to the fact that after the strike ended and the Plaintiffs offered to return to work, there was a shortage of drivers; but, rather than recall the Plaintiffs, the company would work the replacement drivers

over the hours allowed by D.O.T. regulations and instructed her to alter the time cards so that the records would not reflect their actual time. She further testified to the fact that rather than recall the Plaintiffs, the company would utilize commercial labor pool employees at the rate of approximately 5-10 a day and bring in employees from subsidiary companies.

The last affidavit was that of Mr. Paul Dye who was an hourly employee of the company before, during and after the strike. Mr. Dye testified that after the strike ended and the Plaintiffs attempted to return to work, there was, contrary to what was stated by the company, a substantial rate of employee turnover. However, the company would not allow any of the Plaintiffs to return to work but rather used labor pool and subsidiary employees. Mr. Dye testified that several months after the strike had ended, Mr. Max Levit, Owner and President of the company, spoke to a meeting of the employees to encourage them to vote against union certification at an upcoming election. During this meeting, Mr. Levit was asked why the company was not recalling any of the Plaintiffs. In response, Mr. Levit characterized the prestrike workforce, including the Plaintiffs, to an "old car" and the new work force as a "new car." He stated that an "old car" is not as reliable and breaks down more often and the company did not want the "old car" anymore and preferred to keep the "new car."

The Fifth Circuit dismissed these three affidavits as containing nothing more than "stray remarks by three Grocers Supply employees concerning the age of the workers." The Court below held that the evidence offered by Plaintiffs was insufficiently probative to create a jury issue in an ADEA case. That holding is in conflict with other opinions of the appellate courts considering similar evidence on the issue of pretext.

B. CONFLICT AMONG OPINIONS OF THE FIFTH CIRCUIT

Not only does the holding below conflict with the opinions found in other circuits, it is in conflict with precedent which may be found within the Fifth Circuit. For example, the Fifth Circuit held in *Fowler vs. Carrollton Public Library*, 799 F.2d 976 (5th Cir. 1986) that age-related epithets by the Plaintiffs' immediate supervisor and by co-workers in the presence of the supervisor used behind the Plaintiff's back for a lengthy period of time, together with an "equivocal attitude" on the part of the employer toward the Plaintiff, constituted evidence probative of the employer's motivation toward the Plaintiff and required submission of the issue of pretext to the jury. In the case of *Bienkowski vs. American Airlines, Inc.*, 851 F.2d 1503 (5th Cir. 1988), the Fifth Circuit reversed summary judgment in favor of the Defendant employer and stated "[u]nlike the District Court, we are unwilling to assume that indirect comments about [the Plaintiff's] age and adaptability are not possibly probative of an unlawful discriminatory intent...". The comments to which the Court was referring in that case, "as carrying an age-based pejorative implication" consisted only of comments by the Plaintiff's supervisors making rather ambiguous statements regarding the Plaintiff's appearance if he was going to look for another job and comments on his inability or unwillingness to "adapt" to new systems. *Bienkowski, supra* at 1507, note 4. Later, in *Hansard vs. Pepsi Cola Metropolitan Bottling Company*, 865 F.2d 1461 (5th Cir. 1989), the Fifth Circuit followed its earlier opinion in *Bienkowski* and again held that indirect references to an employee's age can support an inference of age discrimination. The comments in that case consisted of a supervisor's question to the Plaintiff as to whether he felt he could handle the new position which involved some heavy

lifting and a passing comment by an employee relations trainee that it was "kind of risky considering [the Plaintiff's] age". *Hansard,* supra at 1465-66. *Hansard* is also significant in that the Fifth Circuit allowed a former employee to offer lay testimony as to his opinion, just as Ms. Joubert offered in this case, regarding age discrimination by the company where his opinion was based on his own experience in the corporation. In *Normand vs. Research of America, Inc.*, 927 F.2d 857, 859 (5th Cir. 1991), the Fifth Circuit yet again concluded that age related comments by supervisors are probative of motivation and even indirect references to an employee's age can support an inference of age discrimination (927 F.2d at 864 n.4).

C. CONFLICT WITH OPINIONS OF OTHER CIRCUITS

Further, the opinion below in this case is in conflict with numerous opinions from other circuits considering the probative value of age related comments. For example, the Third Circuit in *Siegel v. Alpha Wire Corp.*, 894 F.2d 50 (3rd Cir. 1990) held that a managers often used phrase "old dogs won't hunt", even though not directed at any specific individual, was probative evidence on the issue of pretext and, when considered with nothing more than the fact that the Plaintiff had received good evaluations prior to her termination should have allowed the ADEA Plaintiff to withstand the Defendant's motion for summary judgment. Similarly, in the case of *Spulak v. K-Mart Corp.*, 894 F.2d 1150 (10th Cir. 1990), the Tenth Circuit considered evidence that a manager told another employee that "these old fogies are either going to have to comply or get out" and held "that such remarks, even if made in jest, are probative of pretext." Citing *Cooper vs. Asplundh Tree-expert Company*, 836 F.2d 1544, 1548 & n. 2 (10th Cir. 1988). The Seventh Circuit has

also given probative weight to statements which have possible age biased implications. In *U.S.E.E.O.C. vs. Century Broadcasting Corp.*, 957 F.2d 1446 (7th Cir. 1992), that circuit considered statements made by company management that were not even directed in general to its employees but, rather, described a change to a new broadcasting format. There, the Plaintiff introduced into evidence statements by management that the station was "looking for a new young sound" and wanted to "attract a younger audience", that the current format sounded "old and lethargic", that the target audience "does not like the old sound", and that the desired audience could be reached by "giving the station a younger feeling." The Seventh Circuit held that such statements, "though subject to an 'innocent' interpretation, could support an inference of age discrimination when added to the fact that the fired announcers were over 40 years old..." (957 F.2d at 1457).

Your petitioner recognizes that a common thread in all the opinions just cited is that the age related comments were considered in conjunction with other facts offered into evidence. As Plaintiffs in the trial court and Appellees in the court of appeals, Petitioners strenuously argued that the age related comments on the part of management which were introduced into evidence should be considered along with other specific facts testified to by the witnesses (see discussion of affidavits above). The trial court and the appellate court below summarily dismissed Plaintiffs' evidence on the issue of pretext as containing nothing more than "stray remarks in the work place" without considering such statements in light of or in conjunction with the other facts testified to. Indeed, the court below did not even acknowledge in its opinion that the statements offered by the Plaintiffs were attributable to the Defendant's high level management, including its president and principal shareholder, Mr. Max Levit.

In this case, as in *Normand,* supra which represents the Fifth Circuit's most recent pronouncement on the question presented by this petition, Britt and Jackson, both individually and as representative Plaintiffs, presented more than their subjective belief of discrimination and more than "stray remarks" or conclusory statements of age discrimination by other employees in the workplace. Rather, they produced evidence which, considered in its entirety, created a material issue of fact regarding the truth and credibility of the reasons articulated by the Defendant for permanently replacing and never recalling Plaintiffs to their former positions. In light of such evidence, a jury could find in favor of either party on the question of pretext but, as the Third Circuit determined in *Siegel,* supra, "[t]his is precisely the sort of question which must be left to the jury" and granting of summary judgment is erroneous (894 F.2d at 55).

CONCLUSION AND PRAYER

For the foregoing reasons, the Petition for Writ of Certiorari should be granted. Petitioners herein respectfully pray that a Writ of Certiori issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on December 15, 1992.

Respectfully submitted,

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APPENDIX A

U.S. COURT OF APPEALS
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RICHARD E. WINDHORST, JR.
CLERK

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 91-6043

James E. Hamilton, et. al,
Plaintiffs-Appellants,

VERSUS

The Grocers Supply Co, Inc.
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

Before REAVLEY, HIGGINBOTHAM, AND DUHÉ, Circuit Judges.

DUHÉ, Circuit Judge:

The Hamilton plaintiffs request a rehearing on our ruling in *Britt v. Grocers Supply Co., Inc.*, 978 F.2d 1441 (5th Cir. 1992). They contend that we erred in holding that the directed verdict on their ADEA claims should be sustained because they failed to show pretext. We agree, however, rehearing is denied because plaintiffs failed to establish a *prima facie* case.

The district court held that the plaintiffs failed to establish a *prima facie* case, and dismissed the case after the close of plaintiff's case-in-chief. Our decision affirmed the district court's decision, however, we affirmed on the grounds that the plaintiffs failed to show that the defendant articulated nondiscriminatory reasons for refusing to rehire plaintiffs constituted pretext. The Hamilton plaintiffs argue that *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), requires a plaintiff in its case-in-chief to establish only a *prima facie* case. They contend that *McDonnell Douglas* establishes a three step burden shifting process in which the plaintiffs are required to show pretext only after the defendants have articulated a nondiscriminatory reason for failing to rehire. *McDonnell Douglas Corp.*, 411 U.S. at 802. Although plaintiffs argued before this Court that they had proven pretext, we agree that procedurally they are correct. We do not agree, however, that they are entitled to a rehearing.

The standard or review for a directed verdict is the same as that for review of a summary judgment. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242 (1986). We apply the same standard of review as did the district court. *Waltman v. International Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989). "If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes

that reasonable men could not arrive at a contrary verdict, granting of the motions [for directed verdict and for JNOV] is proper." *Boeing Company v. Shipman*, 411 F.2d 365,374 (5th Cir. 1969)(en banc); *Little v. Republic Refining Co.*, 924 F.2d 93, 95 (5th Cir. 1991).

To establish a violation under the ADEA, the plaintiffs must show some adverse employment action by the defendant. *See Young v. Houston*, 906 F.2d 177 (5th Cir. 1990); *Bienkowski v. American Airlines, Inc.* 851 F.2d 1503 (5th Cir. 1988). When the plaintiff has not introduced direct evidence of discrimination, he may still shift the burden of proof to the defendant by establishing a *prima facie* case as required by *McDonnel Douglas*. *Young*, 906 F.2d at 180. To make out a *prima facie* case, the plaintiff must prove the necessary elements "by a preponderance of the evidence." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The elements of a *prima facie* case may be somewhat flexible in an ADEA case according to the facts in issue. *McCorstin v. United States Steel Corp.*, 621 F.2d 749 (5th Cir. 1980). *See Moore v. Sears, Roebuck & Co.*, 464 F.Supp. 357, 361-63 (N.D.Ga. 1979). The district court articulated a three part test that the plaintiffs had to meet in order to establish a *prima facie* case. They had to show (1) the company refused to consider recall applications of protected employees over forty years of age; (2) applications for recall were accepted from workers under forty years of age; (3) the protected workers were qualified for the jobs. The plaintiffs argue that this test is inappropriate under the facts in this case. We disagree.

The plaintiffs voluntarily went on strike, forcing the company to hire replacements. The replacements were eventually made permanent, and few of the striking workers were ever recalled. The plaintiffs claimed adverse treatment based on two of Grocers' employment decisions: (1) the

decisions to permanently replace the striking workers and (2) the failure to recall the strikers as positions became available. They contend that these decisions were motivated by age discrimination because the replacement workers as a group were younger than the striking workers as a group.[1] Relying on *Metz v. Transit Mix*, 828 F.2d 1202 (7th Cir. 1987), the plaintiffs argue that it is unlawful under the ADEA to eliminate older employees as a group based on higher salaries so as to replace them with generally younger workers, who would work for less. In addition to being factually distinguishable from *Metz*, this Court has not adopted the *Metz* line of reasoning, and we decline to do so in this case. *See Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 813 (5th Cir. 1991) (termination due to higher pay is not relevant to age discrimination but seniority); *Williams v. General Motors Corp.*, 656 F.2d 120, 130 (5th Cir. 1981), *cert. denied*, 455 U..S. 943 (1982) (seniority and age discrimination are unrelated).

This Court has held that the plaintiff "must show that [the employer] gave preferential treatment to a younger employee under 'nearly identical' circumstances." *Little*, 924 F.2d at 97. We agree with the district court that comparing the recall of older strikers with the recall of younger strikers provides more meaningful evidence of differential treatment than does a comparison of the strikers with their replacements. Additionally, age differences between an established workforce and a newly hired one are only natural. "[I]n a normal case, absent any discriminatory intent, discharged employees will more often than not be replaced by those younger than they, for older employees are constantly moving out of the labor market, while younger ones move in." *Laugesen v. Anaconda Company*, 510 F.2d

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[1] Members of the plaintiffs' group include workers under 40 years old.

307, 313 n. 4 (6th Cir. 1975). Consequently, we conclude that the test articulated by the district court was appropriate under the facts of this case.

The plaintiffs failed to meet the test set out by the district court. They failed to establish that the company refused to consider recall applications of protected employees over age forty. The record indicates that of the 34 strikers who were returned to work prior to the end of the strike, 20 were age forty or over. All of the remaining strikers, regardless of age, were permanently replaced. Pursuant to the recall agreement, the defendant made 120 recall offers. The average age of the strikers to whom these offers were made was 49.4 years old. Of the 120 offers, 104 went to persons age 40 or over, while only 16 went to persons under age 40. In light of the lack of evidence showing that younger strikers were more favorably treated than older strikers, we conclude that the plaintiffs have not established a *prima facie* case.

For the foregoing reasons, the request for rehearing is DENIED.